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No. 00-189

Supreme Court, U.S.
FILED
SEP - 6 2000

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA and
COUER D'ALENE TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF BENEWAH COUNTY AND KOOTENAI COUNTY OF IDAHO IN SUPPORT OF STATE OF IDAHO, PETITIONER

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I. INTEREST OF AMICI

This Amicus Brief is submitted pursuant to Rule 37. Amici are Benewah County and Kootenai County in the State of Idaho. The navigable waters at issue are located within the Amici Counties. The navigable waters are claimed by the United States and the Coeur d'Alene Tribe. The residents of the Amici have used and enjoyed the navigable waters for more than 100 years. The Amici and the public located in Amici Counties are being affected by the decision of the Court of Appeals, and will be affected by the decision of this Court.

The decision of the Ninth Circuit Court of Appeals in *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) not only ousts the State of Idaho from exercising jurisdiction and authority over the navigable waters within the Coeur d'Alene Indian Reservation, but ousts the Amici Counties from exercising any jurisdiction or authority over activities on such navigable waters. In addition, the Tribe claims that it has the absolute and exclusive authority over the navigable waters, including the power and authority to exclude or prohibit any use of such waters by non-members. The purpose of this Amicus Curiae Brief is to emphasize the far reaching implications of the decision of the Ninth Circuit Court of Appeals and to provide further support for granting the Petition of Idaho.

II. SUMMARY OF THE ARGUMENT

This is a case by the United States bringing an action to quiet title to a portion of the beds and banks of the navigable waters of Coeur d'Alene Lake and the St. Joe River lying within the exterior boundaries of the 1873

Coeur d'Alene Indian Reservation. The Coeur d'Alene Tribe is an intervenor. *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) Petition App. 1, et seq. Generally, the beds and banks of navigable waters are part of the sovereign rights acquired by a state through the operation of the Constitution of the United States when a state is admitted on an equal footing with the original states. *Utah Division of State Lands v. United States*, 482 U.S. 193, 195-197 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); and *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373-74 (1977). Thus, in this case, the Court will be addressing issues that will determine the rights of sovereignty as between the United States, the State of Idaho and the Coeur d'Alene Tribe.

In a contest between the United States and a state involving sovereign rights over land, it is appropriate that such a decision should be rendered by the highest Court of this Nation. *United States v. Texas*, 143 U.S. 621, 643 (1892). As stated in *United States v. Texas*, a decision by this Court under these circumstances best comports "with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation." Regardless of the outcome, this Court should decide this matter.

The Executive Order in 1873, the Agreements between the Tribe and the United States negotiated in 1887 and 1889, the admission of the State of Idaho by Congress on an equal footing in 1890, and the ratification of the 1887 and 1889 agreements by Congress in 1891 should be considered in the context of the congressional and government policy at the time. The government policy and other actions taken by Congress from 1871 to 1891

shows that Congress intended to diminish tribal control and sovereignty. The general policy was for the "assimilation" of individual members.

At the time of the negotiation of agreements with the Coeur d'Alene Tribe, the State of Idaho was admitted on an equal footing with the original states. (Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215.) The rule of law established by this Court prior to admission of Idaho was that new states have the same rights as the original states in lands below the high water mark on navigable waters. *Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1844); and *Shively v. Bowlby*, 152 U.S. 1, 26 (1894). The enactments of Congress and the decisions of this Court which are contemporaneous with the negotiation of agreements with the Coeur d'Alene Tribe support the conclusion that Congress did not intend to recognize tribal ownership of the beds of the navigable waters of Lake Coeur d'Alene and the St. Joe River prior to Idaho statehood in 1890. The conclusion of the Ninth Circuit Court of Appeals upholding tribal ownership of navigable waters is inconsistent with the actions of Congress and the decisions of this Court between 1887-1891.

The concept of the public trust doctrine was first explained in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842). The Public Trust Doctrine was further described in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435, 452 (1892) and establishes the rights of the public in navigable waters. There is no body of law which assures the use of navigable waters by the public, including non-members of the Tribe, if such waters are owned by the United States for the Coeur d'Alene Tribe.

The Coeur d'Alene Tribe has claimed that it may exclude or prohibit any use by non-members of the navigable waters owned by the Tribe. Amicus App. pp. 2 and 5. It is clear that the State of Idaho could not exclude or prohibit the use of such navigable waters by the public. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1093-94 (Idaho 1983). Thus, this case is a matter of extraordinary public interest for all of the people of Benewah and Kootenai Counties.

III. ARGUMENT FOR GRANTING PETITION

A. This Court Should Recognize the Dignity of the State of Idaho and Decide the Ownership Issue of Navigable Waters

This Court has recognized that "the ownership of land under navigable waters is an incident of sovereignty." *Montana v. United States*, 450 U.S. 544, 551 (1981). Control over property underlying navigable waters is strongly identified with the sovereign power of government. *Id.*, 450 U.S. at 552; and *United States v. Oregon*, 295 U.S. 1, 14 (1935). At issue in this case is whether the State of Idaho or the United States and the Coeur d'Alene Tribe have the rights and powers over the lands and water at issue herein. This Court has previously recognized Idaho's ownership of the beds of navigable waters under the equal footing doctrine. *Scott v. Lattig*, 227 U.S. 229, 243 (1913).

This is truly a case of a contest between sovereigns over lands that are closely identified with sovereign power. The issues in this case should be decided by this Court "because it best comport[s] with the dignity of a

State, that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the Nation." *United States v. Texas*, 143 U.S. 621, 643 (1892). It is interesting to note that in the litigation in *United States v. Oregon*, wherein the United States and Oregon were claiming title to a bed of navigable water, the action was brought as an original suit by the United States against the State of Oregon in this Court. *United States v. Oregon*, 295 U.S. at 5. Cases involving such critical rights of sovereignty should be decided by this Court as the highest Court in the land.

B. The Established Government Policy and Law in 1890 Does Not Support United States and Tribal Ownership of Lake Coeur d'Alene

Since the earliest days of our federal government, the policy has been to preserve navigable waters for the use by the public. *See* 1 Stat. 468 (1796); and 2 Stat. 235 (1803). This policy and law remains today. 43 U.S.C § 931.

In the late 1800's, the general policy of Congress was to reduce the role of tribal governments and increase the independence and assimilation of individual tribal members. In 1871, Congress expressly prohibited the acknowledgment or recognition of any tribe as an independent nation, tribe or power with whom the United States may contract by treaty. 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71.) In 1887, Congress enacted the General Allotment Act of February 8, 1887 (24 Stat. 388, et seq.) [25 U.S.C §§ 331, et seq.]. The policy of the General Allotment Act was "to end the tribal and nomadic life of the Indians by allotting a portion of reservation lands in severalty to

each Indian residing on a reservation, and selling off the excess lands. The Indians were to be established as individual settlers on separate allotments of land gaining a livelihood by pastoral pursuits." *Hopkins v. United States*, 414 F.2d 464, 467 (9th Cir. 1969). In *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650, note 1 (1976), this Court noted the object of the General Allotment Act of 1887 was to end tribal land ownership and to provide for private ownership by individual Indians with the expectation of assimilation of individual Indians as members of society and to relieve the Federal Government of the need to supervise Indian affairs.[1]

In 1887 and 1889, the United States negotiated agreements with the Coeur d'Alene Tribe. Pet. App. 68, 74-76. The context of other Congressional enactments during the time-frame of the negotiation of the agreements in 1887 and 1889 together with the admission of the State of Idaho on an equal footing with the original states in 1890, and the 1891 Congressional ratification of the 1887 and

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[1] For a discussion of the General Allotment (Dawes) Act of 1887, see *Cohen's Handbook of Federal Indian Law*, 1982 Ed., pp. 130-132. For further discussions of Federal policies regarding the status of tribes and individual members in the late 1800s, see *United States Department of the Interior, Federal Indian Law*, U.S. Government Printing Office (1958), pp. 245-250 (hereafter referred to as "1958 Federal Indian Law"). It was reported that the " ' . . . settled policy of the Government [was] to break up reservations, destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life and deal with them not as nations or tribes or bands, but as individual citizens.' " 1958 Federal Indian Law at 249 quoting Report, Commissioner of Indian Affairs, 1890, p. VI.

1889 agreements does not support ownership of Coeur d'Alene Lake by the United States or the Coeur d'Alene Tribe. The fact that Congress did not ratify the 1887 and 1889 Agreements until after the admission of Idaho on an equal footing implies that Congress did not intend to defeat Idaho's title to the beds of navigable waters.

C. There Was No International Duty or Public Exigency Sufficient to Defeat Idaho's Title to the Navigable Waters

In many previous cases, this Court has concluded that a conveyance of land under navigable waters would only be upheld because of some international duty or public exigency. *E.g., Montana v. United States,* 450 U.S. 544, 552 (1981); *United States v. Holt State Bank,* 270 U.S. 49, 55 (1926); and *Shively v. Bowlby,* 152 U.S. 1, 58 (1894). There is a strong presumption against a conveyance of the beds of navigable waters to defeat State title. *Montana v. United States,* 450 U.S. at 552. Conveyance of the bedlands are not lightly to be inferred. *Id.*

Here, no "international duty" is shown by the findings of the District Court which would support a defeat of State title. The only "public exigency" found by the District Court relates to subsistence. Pet. App. 60-61. This is controverted by the State of Idaho in its Petition at pp. 7-8. The "public exigency" identified by the District Court has never been recognized by this Supreme Court as a basis for defeating the title of a State. Furthermore, there is no showing of a public purpose appropriate to the objects for which the United States holds title to the territory prior to Idaho statehood. Such public purpose

and intent was established in *United States v. Alaska*, 521 U.S. 1 (1997). Here, there has been no showing of such public purpose. In fact, the general policy of the federal government in the 1880s and 1890s shows that Congress did not intend to extend or promote tribal authority over lands. Thus, the basic requirements for the defeat of State title do not appear in this case.

D. Rights of the Public Under the Public Trust Doctrine are Inconsistent with Tribal Ownership

As shown by the Coeur d'Alene Tribal Code Section 44-1.02, Amicus App. 3 attached hereto, the Coeur d'Alene Tribe claims that it has the exclusive power and authority over the navigable waters within the Coeur d'Alene Indian Reservation. The Tribe further claims that it has the power to exclude or prohibit non-Tribal members from using the submerged lands under the navigable waters. Tribal Code Section 44-2.00. Amicus App. 3-4 Tribal members are defined in Coeur d'Alene Tribal Code Section 44-3.32. Amicus App. 7 This is inconsistent with the public trust doctrine as previously announced by this Court. *See Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892). A state holds the beds of navigable waters in trust for the enjoyment of the public, which includes navigation of the waters and the liberty of fishing on such waters. *Id.*, 146 U.S. at 452.

The public trust doctrine was actually originally described in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 413-14 (1842). In *Martin*, this Court considered the question settled in England that the Magna Carta limited the authority of the King to make a grant of the soils

under navigable waters to exclude the public from enjoying such waters, including the right of fishing, navigation, etc. 16 Pet. at 410. The interest of the King of England devolved upon the original states by virtue of the Revolution. 16 Pet. at 416. New states have been admitted on an equal footing with the original states with the same limitations. *Illinois Central Railroad*, 146 U.S. at 435-437. The State of Idaho holds the lands lying under navigable water subject to the Public Trust Doctrine with its limitations. *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088, 1093-94 (Idaho 1983). The rights of the public to use the lands underlying navigable waters are well established in the United States and the State of Idaho.

The rights of the public, including the residents of these Amici Counties, on navigable waters owned by the United States for the benefit of the Tribe or owned by the Tribe are not established under any law. Tribes are generally not constrained by the Constitutional provisions which govern the federal or state governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); and *Talton v. Mayes*, 163 U.S. 376, 384 (1896). If the Coeur d'Alene Tribal Government legislates to exclude non-members on the navigable Tribal Waters, such Tribal Government is immune from suit unless the Tribe has unequivocally expressed a waiver of its sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58-59. Thus, any suit to protect use of the navigable waters by non-tribal persons would be met by the absence of a law protecting the public's rights under the Public Trust Doctrine and barred by the sovereign immunity of the tribe.

The independence of a tribe from the will and law of non-members is also illustrated in *In Re: Kang-Gi-Shun-Ca, otherwise known as Crow Dog*, 109 U.S. 556, 572 (1883) and *Santa Clara Pueblo*, 436 U.S. at 69-71. As shown in *Santa Clara Pueblo*, a tribe establishes, for itself, its own membership rules. 436 U.S. at 52, Note 2. A person who is not a member of the tribe may not vote in tribal elections or hold office in the Tribal Government. 436 U.S. at 52. The non-member may be excluded from the reservation. 436 U.S. at 52-53. As previously noted, a non-member can be excluded from the use of the navigable waters within the Coeur d'Alene Indian Reservation by tribal law. When Congress admitted Idaho on an equal footing in 1890 and delayed ratifying the 1887 and 1889 Agreements until 1891, it is difficult to conclude that Congress intended to defeat the interests of non-Tribal members and defeat the title of the State of Idaho.

IV. CONCLUSION

This Court should grant the Petition requested by the State of Idaho in this matter. The defeat of Idaho's title to the lands underlying Coeur d'Alene Lake and the St. Joe River should not be implied from the facts of this case.

Respectfully submitted,

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ADOPT ENCROACHMENT ORDINANCES
TRIBAL CODE CHAPTER 44 RESCIND
CDA 144(99) CDA RESOLUTION 333(99)

WHEREAS, The Coeur d'Alene-Tribal Council has been empowered to act for and on the behalf of the Coeur d'Alene Tribe pursuant to the revised Constitution and By-Laws, adopted by the Coeur d'Alene Tribe by referendum November 10, 1984, and approved by the Secretary of the Interior, Bureau of Indian Affairs, December 21, 1984; and

WHEREAS, the Federal Court has ruled in *U.S. and Coeur d'Alene Tribe v. Idaho* that the Tribe owns the submerged lands underlying navigable waters within the Coeur d'Alene Reservation at issue in that case; and

WHEREAS, it is in the best interest of the Tribe to regulate encroachment on and the use of tribal waters; and

WHEREAS, there has been a delay in finalizing the statutes that were to be attached to the CDA Resolution 144(99) dated April 8, 1999; and

NOW, THEREFORE BE IT RESOLVED, That the Coeur d'Alene Tribal Council hereby Rescind CDA Resolution 144(99) dated April 8, 1999, and That the Tribal Code is amended to repeal the existing Chapter 45 and adopt a new Chapter 44 as set out in the Attachment A; and

BE IT FURTHER RESOLVED, That an emergency exists and this resolution shall take effect retro to April 15, 1999.

CERTIFICATION

The foregoing amended resolution was adopted at a meeting of the Coeur d'Alene Tribal Council held at the Tribal Headquarters, 850 A Street, Plummer, Idaho, on August 12, 1999, with the required quorum present by a vote of [4] FOR [0] AGAINST

/s/ Ernest L. Stensgar	**/s/ Richard J. Mullen**
ERNEST L. STENSGAR, CHAIRMAN	**RICHARD J. MULLEN, SECRETARY**
COEUR D'ALENE TRIBAL COUNCIL	**COEUR D'ALENE TRIBAL COUNCIL**

Excerpts from Coeur d'Alene Tribal Code,

Chapter 44

ENCROACHMENTS CHAPTER

44-1.00 JURISDICTION AND INTENT

44-1.01 Jurisdiction. The Coeur d'Alene Tribe has exercised exclusive sovereignty and dominion over the submerged lands and waters within the area now known as the Coeur d'Alene Reservation since time immemorial. The submerged lands and waters within the Coeur d'Alene Reservation are owned by the Coeur d'Alene Tribe and the Tribe is legally entitled to the exclusive use and occupancy of them. *United States and Coeur d'Alene Tribe v. Idaho,* U.S.D.Ct. #CIV 94-0328-N-EJL, July 28, 1998. These submerged lands and waters are essential to the Tribe's "dignity and ancient right." *Coeur d'Alene Tribe v. Idaho,* C.A. No. 92-36703, 42 F.3d 1244 (1944) *reversed*

521 U.S. 261 (1997). As such the regulation of use of the submerged lands and waters are an essential governmental function of the Tribe. The Tribal and public health, safety and welfare requires that any allowed use of and encroachment upon these waters and submerged lands be regulated to protect water quality and quantity, navigation, fish and wildlife habitat, aquatic life, aesthetic beauty and Tribal values.

44-1.02 Tribal Intent. Although the Coeur d'Alene Tribe has the right of exclusive use and occupancy and to exclude non-Tribal member uses of the waters and submerged lands within the Reservation, the Coeur d'Alene Tribe herein permits non-Tribal members the privilege to use these waters and submerged lands in certain specific, well-defined ways. This non-Tribal member use is by permission only and is to be narrowly construed. Except as specifically otherwise authorized in this Chapter, it is the intent of the Coeur d'Alene Tribe to reserve for enrolled members of the Coeur d'Alene Tribe the exclusive use and occupancy of all waters within the Coeur d'Alene Reservation and of all submerged lands underlying navigable waters within the Coeur d'Alene Reservation.

44-2.00 NO RIGHTS CONFERRED

No enforceable rights or privileges regarding use of the waters or submerged lands of the Coeur d'Alene Reservation are conferred by the Chapter on those who are not enrolled members of the Coeur d'Alene Tribe. All use of the waters or submerged lands by non-Tribal members are at the sole discretion of the Tribe. Permissive use by

non-Tribal members is allowed only to the extent specifically authorized by this Chapter. Additional uses are neither inferred nor implied and are denied.

44-3.00 DEFINITIONS

For the purposes of this statute, the following definitions are applicable.

44-3.02 Board means Coeur d'Alene Tribe Lake/River Board.

44-3.03 Boat Garage means any covered structure on Tribal waters with one or more solid sides.

44-3.04 Boom means a series of logs connected together to enclose an area of water.

44-3.05 Breakwater means any encroachment which is designed to protect the shore from wave action.

44-3.06 Buoy means a float or floating object moored to the submerged lands.

44-3.07 Commercial Marina means a facility which leases moorage space or water craft for recreational boating or other water related activities. [means an encroachment which rents or leases moorage space to individual boat owners.]

44-3.08 Compliance Order means any Order issued by the Natural Resource Department to a person directing the action.

44-3.09 Department means Natural Resource Department of the Coeur d'Alene Tribe.

44-3.10 Dock means any platform either floating or non-floating which extends into, over or across the waters to provide boat moorage, access to a moorage area, swimming facilities, or other related activities.

44-3.11 Dredging means the process of excavating materials from the submerged lands thereby altering the elevation of a portion of the submerged lands. The term includes the process of extending the water area landward by excavating material from the lake shore thereby allowing the waters to flow over areas they had not otherwise flowed.

44-3.12 Encroachment means any dock, pier, float home, boat garage, jetty, float, piling, breakwater, boat ramp, channel, basin, land fill, fill, sea wall or other structure on, in or above the submerged lands or waters of the Coeur d'Alene Reservation.

44-3.13 Fill means the process of discharging material into Tribal waters or upon the submerged lands and thereby raising the elevation of a portion of the submerged lands.

44-3.14 Float Home means any dwelling structure floating on Tribal waters that is affixed directly or indirectly to the shore or submerged lands and is not intended to be used primarily for navigation.

44-3.15 High Water Mark means the line, as of the date the Coeur d'Alene Reservation was opened to non-Indian homestead or thereafter below which action of the water renders the land not useful for agricultural purposes.

44-3.16 Jetty means a structure often in pairs which extends from the shoreline into the lake and is designed to confine the flow of water to a narrow zone.

44-3.17 Lease means a lease by the Tribe to a person authorizing use of Tribal waters or submerged

lands, underlying navigable waters pursuant to this Chapter.

44-3.18 Major Variance means a variance that violates a construction or design criteria or creates a major environmental impact. Any variance which does not qualify as a minor variance is also a major variance.

44-3.19 Minor Variance means a variance required by unusual circumstances *and* to which there is no reasonable alternative *and* which poses no adverse impact.

44-3.20 Multi-Family/Coop Dock means any dock owned by two or more individuals used to moor their individual boats.

44-3.21 Pier means a non-floating fixed platform extending out over the water from the shore which is attached to the shoreline or is connected with the shoreline by a gangway.

44-3.22 Piling means a pole or other object driven into the submerged lands.

44-3.23 Repair means to restore an existing encroachment to sound condition by replacing component parts of the encroachment.

44-3.24 Replacement means to rebuild an existing encroachment by removing that encroachment and constructing a new one.

44-3.25 Retaining Wall means any structure built parallel or contiguous to the shore line of Tribal waters which is designed to protect the land mass inland from erosion or wave action.

44-3.26 Rip Rap means a layer, facing or protective mound of stones, logs or other material randomly placed to prevent erosion, scour or slopping of a structure or embankment.

44-3.27 Sea wall means any structure at or below the high water mark designed to protect the area above the high water mark from wave action.

44-3.28 Staff means the employees, contractors or agents of the Coeur d'Alene Tribe charged with implement and enforcement of this Code.

44-3.29 Submerged lands means all lands lower than the high water mark of navigable waters.

44-3.30 Tribal Court means the Court of the Coeur d'Alene Tribe.

44-3.31 Tribal Expenses means those expenses above and beyond the routine costs incurred in processing applications, and includes expenses such as those incurred in major environmental reviews, environmental assessments, environmental impact statements, 404 permit applications, environmental testing and other such expenses.

44-3.32 Tribal Member means an enrolled member of the Coeur d'Alene Tribe.

44-3.33 Tribal Waters means all navigable waters within the Coeur d'Alene Reservation. These waters include, but are not limited to, the southern portion of Lake Coeur d'Alene, the southern portion of Black Lake, the St. Joe River downstream from St. Maries, Lake Chatcolet, Hidden Lake, Benewah Lake, Round Lake and Hepton Lake.

44-3.34 Tribe means Coeur d'Alene Tribe.

44-3.35 Water Use Permit means a permit which authorizes the use of the waters of the Tribe, regardless of navigability, subject to the right of water use permits which are superior as to quantity and priority date.

44-3.36 Wetland means the water land interface area which are inundated or saturated by surface and/or groundwater at a frequency or duration of time periods sufficient to establish, and under natural conditions, support a prevalence of vegetation typically adapted to life in saturated conditions. Wetlands generally include, but are not limited to, swamps, marshes, bogs and similar areas. Wetland areas may be separated from a main body of water by barrier or natural berm.

44-3.37 Wharf means a structure built on the shore of Tribal waters so that vehicles may lie alongside to receive and discharge cargo, passengers or other items.

44-4.00 WATERS/SUBMERGED LANDS REGULATED

The Coeur d'Alene Tribe regulates all submerged lands and waters wherever they come to be located within the Coeur d'Alene Reservation regardless of whether the watercourse is navigable or not and regardless of whether the watercourse is in its natural condition or has been altered by impoundment, dredging or otherwise.

* * *